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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREA ALMANZA ALFARO et al.,

Defendants and Appellants.

B289546

(Los Angeles County
Super. Ct. No. GA100815)

APPEAL from judgments of the Superior Court of
Los Angeles County. Rupa S. Goswami, Judge. Affirmed.

Quinn and Dworakowski and David Dworakowski, under
appointment by the Court of Appeal, for Defendant and Appellant
Andrea Almanza Alfaro.

Michael C. Sampson, under appointment by the Court of
Appeal, for Defendant and Appellant Michelle Angelica Alfaro.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Noah P. Hill and Corey J. Robins, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Andrea Almanza Alfaro and Michelle Angelica Alfaro appeal from the judgments entered after they were convicted in a joint trial.¹ Andrea contends that her robbery conviction is unsupported by substantial evidence. Michelle's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. After reviewing the entire record, we find no merit to Andrea's contention and no arguable issues to support Michelle's appeal. We thus affirm both judgments.

BACKGROUND

Defendants were jointly charged in an amended information with one count of robbery, in violation of Penal Code section 211,² and one count of assault with a deadly weapon, in violation of section 245, subdivision (a). After a jury trial, Andrea was found guilty of second degree robbery as charged in count 1 of the information. The jury acquitted Andrea of assault with a deadly weapon as charged in count 2, and instead convicted her of the lesser related offense of using tear gas or a tear gas weapon in a manner other than self-defense, in violation of section 22810, subdivision (g)(1). Michelle was found not guilty of robbery and assault, but convicted of the lesser included offense of misdemeanor theft, in violation of section 484, subdivision (a).

On March 22, 2018, the trial court sentenced Andrea to two years in jail, suspended the sentence, and placed her on probation for 60 months under specified terms and conditions, with presentence custody credit of 12 actual days and 12 days of conduct credit, and ordered her to pay mandatory fines and fees.

¹ As appellants share the same surname, we henceforth refer to each by her first name to avoid confusion.

² All further statutory references are to the Penal Code unless otherwise indicated.

On the same date, the court placed Michelle on summary probation for five years, later reduced to six months, on specified terms and conditions, and ordered her to pay mandatory fines and fees.

Each defendant timely filed a notice of appeal from her judgment.

Prosecution evidence

Jonathan Gadoy Rubio (Rubio) testified that he was a cell phone distributor. He obtained cell phones from three suppliers he had worked with for the past six years, and resold them on eBay, Amazon, or on the OfferUp application, which allows customers to set up appointments. On March 19, 2017, Michelle set up an appointment to inspect an iPhone she had selected on OfferUp, and they met at a Metro PCS cell phone store. Michelle handled the iPhone for about 10 or 15 minutes and had it activated there. The purchase was completed through OfferUp. They were in the store for a total of about 20 or 25 minutes, and no issues with the phone were encountered.

The next day Michelle contacted Rubio, asked how many gigabytes the phone had, and he replied that it had 16 gigabytes, as was indicated in the OfferUp listing. The following morning Michelle called and said that the phone had been dialing random numbers. Rubio was surprised because the phone was working properly when she purchased it, so he asked whether it had been dropped or water damaged, which Michelle denied. Rubio told her he would call her back to see what he could do for her later. She agreed. Beginning 15 minutes later, Michelle repeatedly called Rubio, until finally he activated his phone's do-not-disturb feature because he was busy with his family.

Later that day another potential customer contacted Rubio about a 64 gigabyte iPhone 6 that he had posted for sale. This was a more expensive phone with a higher level of memory than

the 16 gigabyte phone he had sold to Michelle. They arranged to meet later in an area near Rubio's home. About three hours later he received a text saying that the potential buyer was outside. He then met Andrea. Rubio handed her the iPhone 6, which she held close to her body. Andrea then said he had sold her sister a defective phone and started walking toward a Chevy Tahoe with tinted windows. Rubio walked with her and asked the identity of her sister. Andrea then signaled, and Michelle got out of the Tahoe, approached Rubio, aggressively yelling something about scamming and blocking her. She added that it was not right to sell a defective phone. Rubio replied that it was not his intention, that he would exchange it for the 64 gigabyte phone with no extra charge.

The events that followed happened quickly. Michelle and Andrea stood close to Rubio, one in front, and one at his side. Andrea then pepper-sprayed Rubio once, right in the eye. He stepped back, his eye and neck stinging and his vision blurry. She sprayed him a second time a couple seconds later. As the two women returned to their car, Rubio attempted to photograph the license plate. When he approached within three or four feet of the car, both defendants got out of the car. Michelle charged him and stood in his way to block his view of the license plate, while Andrea approached on his right, threw a cologne bottle toward his head, and pepper-sprayed him again, this time over his entire face, causing greater pain. Rubio thought that Andrea pepper-sprayed him three or four times in all, but could not be sure because everything happened so quickly.

Rubio denied having made any motion to hit Andrea or having placed a hand on her. When Andrea threw the cologne bottle, Michelle said, "No, what are you doing?" Rubio moved his head out of the way and the cologne bottle hit his chest. As the two women returned to the car, Andrea told Rubio to stay away

or she would pull out a “strap,” which he interpreted to mean a gun. Rubio felt threatened and afraid, but continued to attempt to photograph the license plate. When he asked why she would do that just for a phone, Andrea replied, “You don’t know us. You don’t know who you’re messing with.” As they drove away he yelled that he was going to call the police. Michelle told him to go ahead. Rubio went home, rinsed his face, and called the police.

Rubio managed to photograph the Tahoe’s license plate, and in so doing he also got a shot of Michelle as she approached him holding the defective phone. These photographs, along with a photograph of the cologne bottle that Andrea threw at him, were shown to the jury. Rubio also identified photographs of the iPhone 6 that Andrea took from him.

Monterey Park Police officers went to Rubio’s home in response to his call. Officer Alex Mena observed that Rubio’s eyes, face, and neck were red, and he appeared to be in pain, but he was otherwise calm. Rubio was wincing, his eyes were watery, and tears ran down his face. Photographs taken of Rubio by the officers were shown to the jury. Rubio testified that the photographs were taken about 40 minutes after he was sprayed.

The next day, Detective Robin Lopez spoke to Michelle and Andrea, and searched the Tahoe. Detective Lopez testified that she recovered a glass perfume bottle near the driver’s seat, that Andrea produced a small pepper-spray canister, and that Michelle turned over the two iPhones, which Rubio later identified as the one purchased by Michelle and the iPhone 6 that was taken from him.

Defense evidence

Andrea did not testify. Michelle testified that although the phone she bought from Rubio initially worked, by the end of the day it was calling random numbers on its own and froze when she tried to access emails and photographs. She called Rubio the

next morning and told him about the problems. He said he had family issues and would get back to her in a “couple hours” to see what he could do to replace the phone. When she called back in an hour, he told her he was still dealing with family issues and would get back to her. She called a third time, and the call went to voicemail. She became angry after she checked the OfferUp application and could not find his profile. She then called her sister. Later, she told Detective Lopez that she wanted to “set this fool up.” That he would give her a new phone or her money back.

Michelle and Andrea went together to meet Rubio. Andrea got out and spoke to him first, then motioned to Michelle, who got out and asked him, “Why did you scam me out for the phone?” Rubio replied that he intended to exchange the phone and had asked for time. Michelle denied that Rubio showed her another phone, and she claimed that he kept repeating that he would exchange it, and asking for time. Michelle claimed that after she asked Andrea her opinion of his proposal, Andrea said no. Rubio then stepped backward and punched Andrea in the ribs, just behind her arm. Michelle demonstrated for the jury. Andrea responded by pepper-spraying him. The two women then walked back to the car. Rubio followed, took out his cell phone and took photographs of the license plate. When Andrea got out of the car to pepper-spray him again, Michelle said, “No, stop.” Michelle attempted to block Rubio from photographing the license plate. She identified a photograph that Rubio took of her running toward him, looking angry, and trying to get in front of him. The photograph shows her holding a phone, which she claimed was her old iPhone. She did not see Andrea holding the iPhone 6 that was taken from Rubio until later. She also never saw the perfume bottle that day. Michelle decided to keep both phones.

Rebuttal

Since Michelle testified that she could not remember statements she made to Detective Lopez during their recorded interview, even after looking at the transcript, Detective Lopez testified to the statements made. Michelle told the detective that when she first got out of the car and confronted Rubio, he said he could give her a new phone later. She replied, “No, I want it now.” Michelle said that she screamed at Rubio, “Give me the money or give me a good phone,” and he said he did not have it. Michelle then said, “So we took the phone from him.” When Rubio gave Andrea the 64 gigabyte iPhone 6, Andrea said, “Hey, well, you know, you sold my sister a bad phone.” She then tucked the phone into her bra and said, “I’m keeping it.” She then turned and walked away. Later, Andrea said to Michelle, “You keep the new one and I’ll keep the bad one,” because she intended to get it fixed.

DISCUSSION

I. Andrea’s appeal

Andrea contends that her robbery conviction was not supported by substantial evidence. Relying extensively on *People v. Williams* (2013) 57 Cal.4th 776, 787-788 (*Williams*), it is Andrea’s position that the evidence instead showed theft by false pretenses, and insufficient evidence to support a conviction of robbery.

“The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” (*People v. Jones* (1990) 51 Cal.3d 294, 314.) “The same standard

applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 396.) “[B]ecause ‘we must begin with the presumption that the evidence . . . was sufficient,’ it is defendant, as the appellant, who ‘bears the burden of convincing us otherwise.’ [Citation.]” (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430, italics omitted.) Reversal on a substantial evidence ground “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “[T]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.’ [Citation.] It thus is robbery when the property was peacefully acquired, but force or fear was used to carry it away. [Citation.]” (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) “Accordingly, if one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner’s immediate presence, . . . the crime of robbery has been committed.’ [Citation.]” (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*), quoting *People v. Anderson* (1966) 64 Cal.2d 633, 638 (*Anderson*).)

“[L]arceny is a necessary element of robbery. [Citation.]” (*Williams, supra*, 57 Cal.4th at p. 787.) “Two differences in the crimes of larceny and theft by false pretenses tend to support our conclusion that only theft by larceny, not by false pretenses, can

fulfill the ‘felonious taking’ requirement of robbery. [¶] . . . [¶] *[T]heft by false pretenses*, unlike larceny, has no requirement of asportation. The offense requires only that ‘(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation.’ [Citation.] The crime of theft by false pretenses ends at the moment *title to the property is acquired*, and thus cannot become robbery by the defendant’s later use of force or fear.” (*Ibid.*, second italics added.)

On the other hand, “larceny requires a ‘trespassory taking,’ which is a taking without the property owner’s consent. [Citation.] This element of larceny, like all its other elements, is incorporated into California’s robbery statute. [Citations.] By contrast, theft by false pretenses involves the *consensual* transfer of possession *as well as title* of property; therefore, it cannot be committed by trespass. . . . [¶] . . . [However, in] the offense of larceny by trick, . . . a defendant’s fraud vitiates the consent of the victim as a matter of law.” (*Williams, supra*, 57 Cal.4th 788-789, italics added.) For example, “[w]here one is induced to sell property through another’s false representations, if the seller intends to pass only possession at the time of sale, the buyer commits the offense of larceny by trick or device, but if the seller *intends to pass title*, the buyer commits the offense of obtaining property by false pretenses. [Citation.]” (*People v. Randono* (1973) 32 Cal.App.3d 164, 172, italics added.)

While acknowledging the correct rules of substantial evidence review, Andrea instead summarizes the evidence in the light most favorable to her position in order to conclude that the offense was theft by false pretenses. She argues: “Rubio initially gave consensual and actual possession of the phone to Andrea so she could inspect it under the false pretense that she intended to

purchase it. But even after Rubio learned that Andrea was Michelle's sister, he made statements to her that she could keep the phone in lieu of the defective phone he had sold to Michelle [¶] [N]either Andrea nor Michelle used any force to either obtain initial possession of the phone or keep the phone Rubio had turned over for inspection. And Rubio never made any attempt to regain the cell phone he consensually handed to Andrea. The transaction was complete before any use of force was employed."

Andrea's point that Rubio never made any attempt to regain the cell phone demonstrates a misunderstanding of the fear element of robbery. "Resistance by the victim is not a required element of robbery [citation], and the victim's fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show "'conduct, words, or circumstances reasonably calculated to produce fear'" [Citation.]" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775.) As respondent aptly points out: "Assuming for the sake of argument that Rubio willingly handed the phone to [Andrea], there is no dispute about what [Andrea] did next -- she placed the phone out of Rubio's reach, repeatedly applied pepper spray to Rubio's face, threw a glass object at him, and impliedly threatened to shoot him until [Andrea] and Michelle made their escape." We also note that Rubio testified to his belief that Andrea would pull out a gun, and that he felt threatened and afraid. In sum, Andrea not only instilled fear in Rubio, she made her escape after forcibly rendering him incapable of regaining the cell phone, secreted inside her shirt, and then impaired his vision with repeated pepper sprays to his face and eyes.

We also reject Andrea's assertion that there was a consensual transfer of *title* to the iPhone 6, which she infers from Rubio's offers to let her keep the phone in lieu of the phone he

had sold to Michelle. In drawing this unreasonable inference, Andrea ignores that there was no “exchange,” as the offer was not accepted and the defective phone was not returned. Furthermore, she disregards Rubio’s testimony in response to the question, “After you offered to exchange the two phones, what happened?” Answer, “Michelle said -- she asked Andrea what do you think? Right when she asked Andrea, Andrea said no and she just pepper-sprayed me.”

After reviewing all the evidence in support of the verdict, we conclude that however Andrea obtained possession of the iPhone 6, substantial evidence supports the findings that she did not obtain title to it, that she then carried it away by means of force or fear, and that she committed robbery, not theft by false pretenses.

II. Michelle’s appeal

After Michelle’s appointed counsel filed a brief pursuant to *Wende* raising no issues, we notified defendant on September 28, 2018, of her counsel’s brief and gave her leave to file, within 30 days, her own brief or letter stating any grounds or argument she might wish to have considered. That time elapsed, and Michelle submitted no brief or letter. After reviewing the entire record, as summarized above, we are satisfied that Michelle’s appellate counsel has fully complied with his responsibilities and that no arguable issue exists. We conclude that Michelle has, by virtue of counsel’s compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against her in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

DISPOSITION

The judgments are affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST